

Hearing
March 18, 2003

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Forever Enterprises, Inc.¹

Serial No. 76/318,749

Matthew A. Rosenberg and Jeffrey L. Michelman of Blumenfeld Kaplan & Sandweiss, P.C. for Forever Enterprises, Inc.

Elissa Garber Kon, Trademark Examining Attorney, Law Office 116 (Meryl Hershkowitz, Managing Attorney).

Before Cissel, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Forever Enterprises, Inc. seeks to register the term FAMILY TREE MEMORIALS on the Principal Register for services identified as "providing an on-line electronic database

¹ Application Serial No. 76/318,749 was filed on September 28, 2001 by Heavenly Door Corp., a Minnesota corporation, based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. Later papers revealed the applicant would have more accurately been identified as Remembered Ones.Com, Inc. d/b/a Heavenly Door Corp., a Minnesota corporation. On February 15, 2002, this intent-to-use based application was assigned to Transcontinental Acceptance Corporation, a Minnesota corporation, along with the portion of the business to which the mark pertained. Then on February 20, 2002, this intent-to-use application was assigned to the current owner, Forever Enterprises, Inc., a Texas corporation, along with the goodwill of the business symbolized thereby. All of these transfers of interest are recorded with the Assignment Branch of the United States Patent and Trademark Office.

featuring an aggregation of information and memorials concerning family members and for creating and tracing the descent of persons or families," in International Class 42.

This case is now before the Board on appeal from the final refusal to register on the ground that the term FAMILY TREE MEMORIALS is merely descriptive of applicant's services under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1).

Both applicant and the Trademark Examining Attorney have fully briefed the case. Similarly, both applicant and the Trademark Examining Attorney appeared at an oral hearing held before the Board on March 18, 2003.

We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of the ingredients, qualities or characteristics of the goods or services with which it is used or is intended to be used. A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). The question of whether a particular term is merely descriptive

must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used or is intended to be used, and the significance that the mark is likely to have on the average purchaser encountering the services in the marketplace. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); and In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

Applicant argues that its service mark may be suggestive but is not merely descriptive. According to applicant, potential consumers would have to use some imagination or thought in order readily to understand the nature of these unique services being offered by applicant in connection with this mark.

It is the Trademark Examining Attorney's position that FAMILY TREE MEMORIALS immediately "tells consumers that the applicant provides a database of online 'memorials' concerning family members and creates and traces the descent of persons or families, known as creating a 'family tree.'" In support of this refusal, the Trademark Examining Attorney has submitted (i) dictionary definitions of the terms "memorial" and "family tree" as well as (ii) federal registrations where each of these terms is clearly treated as merely descriptive when registered in connection with goods or services related

to the provision of memorials, and goods or services for the provision of genealogical information,² respectively.

The record shows that applicant's relatively new services consist of creating digital memorials, made available at a cemetery kiosk or over the Internet. Using digital technology, applicant produces in its studio multimedia, biographical tributes for the recently deceased. The final products may feature materials drawn from home videos, slides, family photos and oral histories as well as family trees, genealogies, etc.

Applicant seems almost to concede the descriptiveness of the two separate components of this composite mark:

The term 'FAMILY TREE' is defined as a genealogical diagram [emphasis in original] of a family's ancestry or the ancestors and descendants of a family considered as a group. Applicant has applied for the mark FAMILY TREE MEMORIALS for use in connection with providing an on-line database featuring an aggregation of information and memorials concerning family members, and for creating and tracing the descent of persons or families. Applicant is a well known company providing services relating to all aspects of funerals and burials, including non-traditional ways of honoring friends and family members who have passed away. Applicant maintains a website dedicated entirely to preserving memories of the deceased through

² These third-party registrations (on the Supplemental Register, or on the Principal Register with the words "Family Tree" disclaimed apart from the composite mark as shown) are marks used in connection with software and periodicals. By contrast, applicant's counsel insisted during oral argument that applicant should be placed squarely in the "death business." Nonetheless, the nub of applicant's services, as recited in this application, is making multimedia presentations featuring computerized links to family trees. Hence, the treatment of the term "family tree" in past registrations for genealogical software, printed publications, etc., is analogous to this case.

written remembrances, photos, video clips and other mementos, or 'MEMORIALS' [emphasis in original]. Applicant has expanded its services by providing the capability to combine these written remembrances with one's lineage. The result is an interactive 'FAMILY TREE' which goes beyond merely tracing names throughout one's ancestry. Applicant strives to offer something beyond the names of one's ancestors. The format in which Applicant provides its services under the subject mark results in a finished product separate and distinct from the traditional meaning either of [sic] term.

Furthermore, the manner in which Applicant provides its services is not evident from the subject mark. A consumer would have to use some imagination or thought in order to realize the nature of Applicant's services. [Citations omitted] 'MEMORIAL' is defined as 'Something, especially a monument, designed or established to perpetuate remembrance, as of a person.' The Examining Attorney argues that the online memorials contain or feature the type of information one would expect in a 'FAMILY TREE'. However, Applicant's mark is not used primarily in connection with managing and recording genealogical data. The genealogical data that appears on Applicant's website is a collateral feature of the services Applicant provides. Instead, Applicant uses a 'FAMILY TREE' as the outline which links users to 'MEMORIALS' which are the focal point of Applicant's services. Since these services are not representative of a traditional 'FAMILY TREE', the mark FAMILY TREE MEMORIALS is suggestive, not descriptive of Applicant's services.

(Applicant's appeal brief, pp. 3 - 4).

As noted by the Trademark Examining Attorney, applicant uses the word "*memorials*" in a highly descriptive manner, both in its recitation of services and in the portion of the appeal brief cited above. Similarly, that applicant's digital memorials provide for multimedia presentations that go beyond the static, two-dimensional diagram associated with a traditional "family tree" does not change the fact that

applicant clearly acknowledges that a *family tree* may well be a "collateral feature" of its digital *memorials*.

Applicant argues that even if one were to conclude that the two separate components of this composite mark were individually merely descriptive of applicant's services, the unique combination will not permit potential customers to grasp the nature of applicant's services. Again, we agree with the Trademark Examining Attorney that while these services may well be novel, the mark applicant has selected immediately conveys knowledge of the features or characteristics of the services with which this mark is used. In the context of applicant's recited services, there is nothing indefinite, unexpected or incongruous about the mark, and no amount of thought or imagination is necessary to determine the characteristics or features of the services to which the mark refers. The mark is simply a combination of two terms that are merely descriptive of applicant's services, and the composite does not create a separate, different, or nondescriptive meaning.

Decision: The refusal to register FAMILY TREE MEMORIALS under Section 2(e)(1) of the Lanham Act is hereby affirmed.